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## 13.1 Chapter Overview

The parties to relationships involving domestic violence frequently cross jurisdictional lines in their efforts to perpetrate or escape abuse. Difficult enforcement questions arise when these parties turn to the courts of multiple jurisdictions for assistance with their disputes over access to children. This chapter addresses domestic violence as a factor in resolving these questions. The discussion covers the following governing authorities:

- ♦ The Uniform Child-Custody Jurisdiction and Enforcement Act, MCL 722.1102 et seq.
- ♦ The federal Parental Kidnapping Prevention Act, 28 USC 1738A.
- ♦ The Hague Convention on the Civil Aspects of International Child Abduction, and its enabling legislation, 42 USC 11601-11611.

Criminal penalties for parental kidnapping are discussed in Sections 3.5 - 3.6. Full faith and credit for sister state and tribal civil protection orders is discussed in Section 8.13. See Section 10.4 for a discussion of confidentiality requirements.

## 13.2 Interstate Custody Proceedings — The Governing Law

\*This historical discussion is taken, in part, from *In re Clausen*, 442 Mich 648, 661-665, 669 (1993).

Interstate enforcement of child-custody orders issued by U.S. courts has historically\* been a source of difficulty due to uncertainty about the application of the Full Faith and Credit Clause of the U.S. Constitution, US Const, art IV, §1. Uncertainty has existed because custody decrees are generally subject to modification; accordingly, courts felt free to modify prior custody orders issued in other jurisdictions. As a result, parents who were dissatisfied by custody orders issued in one jurisdiction were frequently motivated to transport their children to another jurisdiction in an effort to achieve a more favorable result in a different court.

To combat the problems caused by parental “forum shopping,” the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) promulgated the Uniform Child Custody Jurisdiction Act (“UCCJA”) in 1968. The UCCJA provided standards for determining whether a state could take jurisdiction of a child-custody dispute. It also determined when courts would enforce sister state custody decrees and set forth the circumstances under which modification of sister state decrees was permitted.

Because all states did not adopt identical versions or interpretations of the UCCJA, its enactment did not completely do away with uncertainties about interstate enforcement of domestic custody orders. In response to this continuing uncertainty, the U.S. Congress enacted the Parental Kidnapping Prevention Act (“PKPA”), 28 USC 1738A, in 1980. The PKPA requires each state to give full faith and credit to the child custody and visitation determinations of its sister states if these determinations are consistent with the Act’s jurisdictional standards and notice requirements. *Thompson v Thompson*, 484 US 174, 182 (1998) (holding that the PKPA is addressed to state courts; it does not provide a private cause of action in federal court to determine the validity of conflicting custody decrees.)

The PKPA was intended to function with the UCCJA in a correlative and complementary fashion.\* However, there were significant differences between the PKPA and the UCCJA. Although the PKPA jurisdictional standards are derived from the UCCJA, the PKPA differs from the UCCJA in that it prohibits concurrent jurisdiction and protects the exclusive jurisdiction of a state that issues a decree consistent with its provisions. Once a state exercises jurisdiction consistent with the PKPA, no other state may exercise concurrent jurisdiction over the custody dispute, even if the other state would have been empowered to take jurisdiction in the first instance. Furthermore, all states must accord full faith and credit to the first state's decree. *Thompson v Thompson, supra*, 484 US at 177.

The different standards in the UCCJA and PKPA resulted in cases where a court would have jurisdiction to decide a custody or visitation dispute under the UCCJA, but not under the PKPA. The UCCJA was widely criticized for its potential to create concurrent jurisdiction in multiple courts. To address this issue, the NCCUSL developed the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"). Effective April 1, 2002, the Michigan Legislature repealed the UCCJA and adopted the UCCJEA. MCL 722.1406. The UCCJEA ameliorates the problem of concurrent jurisdiction by giving priority to a child's home state. This is consistent with the PKPA. In addition, the UCCJEA provides for exclusive continuing jurisdiction in the state that issued a custody determination in substantial conformity with the UCCJEA. Custody determinations that are consistent with the UCCJEA and PKPA are entitled to full faith and credit by other states.

The UCCJEA governs procedures for "child-custody proceedings" when one or both of a child's parents reside outside of Michigan. It also provides for enforcement and modification of out-of-state custody decrees, judgments, or orders. The UCCJEA contains provisions for filing and registering other states' custody decrees, judgments, and orders; communication between the courts of different states; petition requirements; notice and service of process; and gathering evidence safely from the parties.

### 13.3 Purposes of the UCCJEA

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") adopted the model Uniform Child-Custody Jurisdiction and Enforcement Act in 1997 ("Model Act").\* The Model Act contains a useful "Prefatory Note" and comments on each section. Although the comments are not binding upon courts, they may assist courts in interpreting and applying the UCCJEA. When a court takes action pursuant to the UCCJEA, the purposes of the UCCJEA should be kept in mind. The comment to Section 101 of the Model Act states that the UCCJEA should be interpreted according to its purposes, which are to:

"(1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past

\*Blakesley, *Child Custody — Jurisdiction & Procedure*, 35 Emory L J 291, 339 (1986). See also Goelman, et al, *Interstate Family Practice Guide: A Primer for Judges*, §§202, 302 (ABA Center on Children & the Law, 1997).

\*For a copy of the Model Act, see <http://www.law.upenn.edu/bll/ulc/uccjea/final1997act.htm> (last visited February 24, 2004).

resulted in the shifting of children from State to State with harmful effects on their well-being;

“(2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child;

“(3) Discourage the use of the interstate system for continuing controversies over child custody;

“(4) Deter abductions of children;

“(5) Avoid relitigation of custody decisions of other States in this State;

“(6) Facilitate the enforcement of custody decrees of other States . . . .”

Michigan’s UCCJEA echoes the Comment’s emphasis on achieving uniformity among states that have enacted it. MCL 722.1401 states: “In applying and construing this uniform act, the court shall give consideration to the need to promote uniformity of the law with respect to its subject matter among states that enact it.”

## 13.4 Full Faith and Credit Under the UCCJEA

The UCCJEA requires Michigan courts to give full faith and credit to orders issued in other states if the orders are consistent with the UCCJEA’s jurisdictional standards and notice requirements. MCL 722.1312 states:

“A court of this state shall accord full faith and credit to an order issued by another state and consistent with this act that enforces a child-custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under article 2 [governing jurisdiction, MCL 722.1201, et seq.].”

The UCCJEA requires Michigan courts to give full faith and credit to the child-custody orders of foreign nations in the same manner as they are required to give full faith and credit to the orders of other states. MCL 722.1105 states:

“(1) A court of this state shall treat a foreign country as a state of the United States for the purposes of applying articles 1 [miscellaneous provisions, MCL 722.1101, et seq.] and 2 [governing jurisdiction, MCL 722.1201, et seq.].

“(2) Except as otherwise provided in subsection (3), a child-custody determination made in a foreign country under factual

circumstances in substantial conformity with the jurisdictional standards of this act must be recognized and enforced under article 3 [governing enforcement, MCL 722.1301 et seq.].

“(3) A court of this state need not apply this act if the child-custody law of a foreign country violates fundamental principles of human rights.”

Similarly, the UCCJEA requires Michigan courts to give full faith and credit to the child-custody orders of tribal courts. An interstate proceeding involving an Indian child is governed by the Indian Child Welfare Act.\* However, Indian tribes of other states are treated as states for purposes of the UCCJEA. MCL 722.1104(1)–(2). An Indian tribe’s custody determination must be recognized and enforced under the UCCJEA if it was made in substantial conformity with the UCCJEA. MCL 722.1104(3).

\*For more information on the Indian Child Welfare Act, see Miller, *Child Protective Proceedings Benchbook (Revised Edition)* (MJJ, 2003), Chapter 20.

## 13.5 Jurisdiction Under the UCCJEA

In response to a petition in a child-custody or visitation dispute involving another jurisdiction, a Michigan court must first inquire whether it has jurisdiction under one of the bases provided in the UCCJEA. Upon request of a party, a question regarding the existence or exercise of jurisdiction under the UCCJEA must be given priority by a court and handled expeditiously. MCL 722.1107.

The UCCJEA governs procedures in “child-custody proceedings” when one or both of a child’s parents reside outside of Michigan. The UCCJEA defines “child-custody proceedings” as follows:

“‘Child-custody proceeding’ means a proceeding in which legal custody, physical custody, or parenting time with respect to a child is an issue. Child-custody proceeding includes a proceeding for divorce, separate maintenance, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. Child-custody proceeding does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under [MCL 722.1301 et seq.].”

The UCCJEA defines “child custody determination” as follows:

“‘Child-custody determination’ means a judgment, decree, or other court order providing for legal custody, physical custody, or parenting time with respect to a child. Child-custody determination includes a permanent, temporary, initial, and modification order. Child-custody determination does not include an order relating to child support or other monetary obligation of an individual.” MCL 722.1102(c).

The second inquiry a Michigan court must make is whether a proceeding has been commenced in another state. A proceeding is “commenced” when the first pleading is filed. MCL 722.1102(e). Michigan must not exercise jurisdiction if a proceeding has been commenced in another state. MCL 722.1206(1)-(2) provide:

\*See Section 13.5(E)(1) for information on determining the most convenient forum.

“(1) Except as otherwise provided in [MCL 722.1204, governing emergency jurisdiction], a court of this state may not exercise its jurisdiction under this article if, at the time of the commencement of the proceeding, a child-custody proceeding has been commenced in a court of another state having jurisdiction substantially in conformity with this act, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum\* under [MCL 722.1207].

\*See Section 13.7 for a discussion of communication pursuant to the UCCJEA.

“(2) Except as otherwise provided in [MCL 722.1204], before hearing a child-custody proceeding, a court of this state shall examine the court documents and other information supplied by the parties as required by [MCL 722.1209]. If the court determines that, at the time of the commencement of the proceeding, a child-custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this act, the court of this state shall stay its proceeding and communicate with the court of the other state.\* If the court of the state having jurisdiction substantially in accordance with this act does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the child-custody proceeding.”

## A. Pleading Requirements

MCL 722.1206(2) requires a Michigan court to examine the information supplied by the parties pursuant to MCL 722.1209 in order to determine if a child-custody proceeding has been commenced in a court of another state. MCL 722.1209(1) provides the pleading requirements as follows:

\*See Section 10.4 regarding confidentiality. See also MCL 722.1209(5), discussed below.

“(1) Subject to the law of this state providing for confidentiality\* of procedures, addresses, and other identifying information, in a child-custody proceeding, each party, in its first pleading or in an attached sworn statement, shall give information, if reasonably ascertainable, under oath as to the child’s present address, the places where the child has lived during the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or sworn statement must state all of the following:

(a) Whether the party has participated, as a party or witness or in another capacity, in another child-custody proceeding with the child and, if so, identify the court, the case number of the

child-custody proceeding, and the date of the child-custody determination, if any.

(b) Whether the party knows of a proceeding that could affect the current child-custody proceeding, including a proceeding for enforcement or a proceeding relating to domestic violence, a protective order, termination of parental rights, or adoption, and, if so, identify the court, the case number, and the nature of the proceeding.

(c) The name and address of each person that the party knows who is not a party to the child-custody proceeding and who has physical custody of the child or claims rights of legal custody or physical custody of, or parenting time with, the child.”

If the information required by MCL 722.1209(1) is not provided, the court on its own motion or on the motion of a party, may stay the proceeding until the information is provided. MCL 722.1209(2).

If the pleading indicates that the party has participated in a child-custody proceeding involving the same child or the existence of another child-custody proceeding involving the same child, the court may require the petitioner to give additional information under oath. The court may also examine the parties under oath regarding the details of the information provided and any other matter pertinent to the court’s jurisdiction or disposition. MCL 722.1209(3).

The parties have a continuing duty to keep the court informed of any proceedings in this or another state that could affect the current child-custody proceeding. MCL 722.1209(4).

If the health, safety, or liberty of a party or the child would be put at risk from the disclosure of identifying information, then the court may seal the information pursuant to MCL 722.1209(5), which states:

“If a party alleges in a sworn statement or a pleading under oath that a party’s or child’s health, safety, or liberty would be put at risk by the disclosure of identifying information, the court shall seal and not disclose that information to the other party or the public unless the court orders the disclosure after a hearing in which the court considers the party’s or child’s health, safety, and liberty and determines that the disclosure is in the interest of justice.”

The UCCJEA provides that a Michigan court has jurisdiction to make an *initial* child-custody determination and jurisdiction to modify *existing* child-custody determination in certain circumstances.

## B. Initial Orders

A Michigan court may exercise its jurisdiction to make an initial child-custody determination if it has one of the following:

- ♦ “home state” jurisdiction;
- ♦ “significant connection” jurisdiction (if no other state has “home state” jurisdiction, or if the child’s “home state” has declined jurisdiction);
- ♦ “last resort” jurisdiction (if no other state has “home state” or “significant connection” jurisdiction, or if all courts having jurisdiction have declined jurisdiction); or
- ♦ “temporary emergency” jurisdiction.

\*See Section 13.6.

These are the exclusive jurisdictional basis for a Michigan court to make a child-custody determination under the UCCJEA. MCL 722.1201(2)-(3). In addition, persons entitled must receive notice and an opportunity to be heard.\*

### 1. “Home State” Jurisdiction

\*For information on jurisdiction for modification of existing orders, see Section 13.5(D).

The UCCJEA gives priority to “home state” jurisdiction. If Michigan has “home state” jurisdiction under the UCCJEA, it may make an *initial* child-custody determination.\* MCL 722.1201(1)(a) states:

“(1) Except as otherwise provided in [MCL 722.1204, governing “temporary emergency” jurisdiction], a court of this state has jurisdiction to make an initial child-custody determination only in the following situations:

(a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.”

MCL 722.1102(g) defines “home state” as follows:

“(g) ‘Home state’ means the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than 6 months of age, the term means the state in which the child lived from birth with a parent or person acting as a parent. A period of temporary absence of a parent or person acting as a parent is included as part of the period.”

“Person acting as a parent” means a person who meets both of the following criteria:

“(i) Has physical custody of the child or has had physical custody for a period of 6 consecutive months, including a temporary absence, within 1 year immediately before the commencement of a child-custody proceeding.

“(ii) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state.” MCL 722.1102(m)(i)–(ii).

## 2. “Significant Connection” Jurisdiction

If another state does not have “home state” jurisdiction, or if another state does have “home state” jurisdiction but declines to exercise that jurisdiction because Michigan is a more convenient forum,\* Michigan may exercise jurisdiction to make an initial child custody determination under certain circumstances. MCL 722.1201(1)(b) states:

“(1) Except as otherwise provided in [MCL 722.1204, governing “temporary emergency” jurisdiction], a court of this state has jurisdiction to make an initial child-custody determination only in the following situations:

...

(b) A court of another state does not have jurisdiction under subdivision (a) [“home state” jurisdiction], or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under [MCL 722.1207 or MCL 722.1208], and the court finds both of the following:

(i) The child and the child’s parents, or the child and at least 1 parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.

(ii) Substantial evidence is available in this state concerning the child’s care, protection, training, and personal relationships.”

The phrase “significant connection” is not defined in the UCCJEA. In deciding whether to exercise “significant connection” jurisdiction under the former UCCJA, Michigan courts looked to factors such as duration of the child’s stay in a state, extended family members living in a state, school enrollment, and location of health care providers. See, e.g., *Farrell v Farrell*, 133 Mich App 502, 509 (1984), and *Dean v Dean*, 133 Mich App 220, 226 (1984).

\*See Section 13.5(E)(1) for a discussion of “inconvenient forum.”

### 3. “Last Resort” Jurisdiction

If all courts having either “home state” or “significant connection” jurisdiction of a proceeding have declined jurisdiction because Michigan is a more convenient forum, or if no other state has jurisdiction, a Michigan court may exercise its jurisdiction to make an initial child-custody determination. MCL 722.1201(c)–(d). Communication between the courts involved in a child-custody dispute is critical to making informed decisions about assuming “last resort” jurisdiction. See Section 13.7 for a discussion of the UCCJEA’s communication requirements.

### 4. “Temporary Emergency” Jurisdiction

In applying the UCCJEA in cases where domestic violence is an issue, the provisions for emergency jurisdiction are of particular significance. A Michigan court may take “temporary emergency” jurisdiction even though it may not take “home state” or “significant connection” jurisdiction. Moreover, Michigan’s duty to recognize and enforce the custody determination of another state does not take precedence over Michigan’s authority to enter temporary emergency orders. See MCL 722.1206(1) and Model Act, Section 204, Comment. Michigan may obtain “temporary emergency” jurisdiction if a child is present in this state and is abandoned, or if a child, the child’s sibling, or the child’s parent “is subjected to or threatened with mistreatment or abuse.” MCL 722.1204(1).

**Note:** The UCCJEA defines an emergency in terms of threatened or actual harm to the child, the child’s sibling, or the child’s parent. Abuse of a parent is significant to a child’s welfare. When children are exposed to adult abuse as observers, participants, or victims, they may suffer harm sufficient to invoke a court’s protection under the UCCJEA’s emergency provisions.

A Michigan court may issue an order to take a child into custody if it appears likely that a child will suffer imminent physical harm or will imminently be removed from the state. MCL 722.1310. If no other proceeding has been commenced or a custody determination made by either another state’s court or another Michigan court having jurisdiction, a Michigan court’s order made under the temporary jurisdiction provisions remains in effect until an order is obtained from a court of a state having “home state,” “significant connection” or “last resort” jurisdiction. MCL 722.1204(2). If a child-custody proceeding has not been or is not commenced in a court of a state having “home state,” “significant connection,” or “last resort” jurisdiction, a child-custody determination made pursuant to “temporary emergency” jurisdiction becomes a final child-custody determination, if that is what the determination provides and this state becomes the home state of the child. *Id.*

If a proceeding has been commenced in or a custody determination has been made by another state’s court, a Michigan court’s order must specify a time period during which it will remain in effect. The time period must be adequate

to allow a person to seek an order from the other state's court. MCL 722.1204(3). In such circumstances, the Michigan court must immediately communicate with a court in the other state in order to "resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order." MCL 722.1204(4). For a discussion of the UCCJEA's requirements for communication between courts, see Section 13.7.

**Note:** A PPO proceeding may often be the procedural vehicle for invoking "temporary emergency" jurisdiction under the UCCJEA because the UCCJEA authorizes the court to assume "temporary emergency" jurisdiction when the child, the child's parent, or the child's sibling has been subjected to or threatened with mistreatment or abuse. An order issued under "temporary emergency" jurisdiction is entitled to interstate enforcement and nonmodification under the UCCJEA only when the notice and hearing requirements of the UCCJEA are fulfilled. See Model Act, Section 204, Comment.

### C. Exclusive Continuing Jurisdiction

With the exception of "temporary emergency" jurisdiction, once a Michigan court exercises jurisdiction under the UCCJEA to make an initial child-custody determination or to modify another state's determination, it retains jurisdiction until the Michigan court determines that either of the following has occurred:

"(a) A court of this state determines that neither the child, nor the child and 1 parent, nor the child and a person acting as a parent\* have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships.

"(b) A court of this state or a court of another state determines that neither the child, nor a parent of the child, nor a person acting as the child's parent presently resides in this state." MCL 722.1202(1)(a)–(b).

Thus, if a child, a parent, or person acting as a parent remains in Michigan, Michigan retains continuing jurisdiction until neither the child, the child and a parent, nor the child and a person acting as a parent have a significant connection with Michigan and there is no longer substantial evidence in Michigan concerning the child's care, protection, training, and personal relations. See Section 13.5(B)(2) on "significant connection" jurisdiction and Model Act, Section 202, Comment. "A party seeking to modify a custody determination must obtain an order from the original decree state stating that it no longer has jurisdiction." Model Act, Section 202, Comment.

\*See Section 13.5(B)(1) for the definition of "person acting as a parent."

If the child, the child's parents, and any person acting as the child's parent no longer reside in Michigan, Michigan loses its continuing jurisdiction. Either a Michigan court or a court of another state may make this determination. If a non-custodial parent returns to Michigan, its exclusive continuing jurisdiction is not re-established. *Id.*

**Note:** "Residence" is not used in the same sense as the technical term "domicile." "The fact that [a Michigan court] still considers one parent a domiciliary does not prevent it from losing exclusive, continuing jurisdiction after the child, the parents, and all persons acting as parents have moved from [Michigan]." Model Act, Section 202, Comment.

A Michigan court with exclusive, continuing jurisdiction may subsequently decline to exercise that jurisdiction if it determines that it is an inconvenient forum. MCL 722.1202(2). See Section 13.5(E)(1) for a discussion of inconvenient forum.

A Michigan court that has made a child-custody determination but that does not have exclusive continuing jurisdiction may modify that child-custody determination only if it has jurisdiction to make an *initial* child-custody determination. MCL 722.1202(3). See Section 13.5(B) for a discussion of jurisdiction to make an initial child-custody determination.

#### **D. Modification of Another State's Existing Order**

A Michigan court shall not modify another state's decree, judgment, or order unless the Michigan court has "home state" or "significant connection" jurisdiction, and either:

- the court of the other state determines that it no longer has exclusive continuing jurisdiction, or
- the court of the other state has determined that Michigan would be a more convenient forum, or
- the court of the other state or a Michigan court determines that neither the child, nor the child's parent, nor a person acting as a child's parent currently resides in the other state. MCL 722.1203(a)–(b).

**Note:** It is extremely important for a court to communicate with other courts to determine if another court still has jurisdiction or to determine which court is the most convenient forum. See Section 13.7 for information on communication between the courts pursuant to the UCCJEA.

If a proceeding to modify a child-custody determination is commenced in Michigan, the court must determine whether a proceeding to enforce the child-custody proceeding has been commenced in another state. MCL

722.1206(3). If the court determines that an enforcement proceeding has been commenced in another state, the court may do any of the following:

“(a) Stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement.

“(b) Enjoin the parties from continuing with the proceeding for enforcement.

“(c) Proceed with the modification under conditions it considers appropriate.” MCL 722.1206(3)(a)-(c).

## E. Declining to Exercise Jurisdiction

A Michigan court with jurisdiction may decline to exercise its jurisdiction if the court determines any of the following:

- ♦ it is an inconvenient forum and a court of another state is a more appropriate forum;
- ♦ the child-custody determination is incidental to an action for divorce or another proceeding; or
- ♦ the petitioner has engaged in unjustifiable conduct.

### 1. Inconvenient Forum

A court may decline to exercise its jurisdiction under the UCCJEA if it finds that another state is a more convenient forum. MCL 722.1207(1). “The issue of inconvenient forum may be raised upon motion of a party, the court’s own motion, or the request of another court.” *Id.* To determine the appropriateness of a forum, a court must consider all relevant factors, including all of the following:

“(a) *Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child.*

“(b) The length of time the child has resided outside this state.

“(c) The distance between the court in this state and the court in the state that would assume jurisdiction.

“(d) The parties’ relative financial circumstances.

“(e) An agreement by the parties as to which state should assume jurisdiction.

“(f) The nature and location of the evidence required to resolve the pending litigation, including the child’s testimony.

“(g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence.” [Emphasis added.]

The Model Act, Section 207, Comment, notes the following:

“Subparagraph [(a)] is concerned specifically with domestic violence and other matters affecting the health and safety of the parties. For this purpose, the court should determine whether the parties are located in different States because one party is a victim of domestic violence or child abuse. If domestic violence or child abuse has occurred, this factor authorizes the court to consider which State can best protect the victim from further violence or abuse.”

The factors listed in MCL 722.1207(1) are not intended to be an exhaustive listing of the circumstances that a court may consider. The statute provides that a court “shall consider *all relevant factors*, including . . . .” [Emphasis added.] See *Stoneman v Drollinger*, 64 P3d 997 (2003) for a case illustrating the application of the statutory factors governing declination of jurisdiction for inconvenient forum. Although *Stoneman* is not binding precedent in Michigan, it discusses in great detail each of the factors as they relate to a situation where a parent and the children move to another state in order to escape from domestic violence perpetrated by the other parent. The *Stoneman* court urged lower courts to give priority to the safety of victims of domestic violence when considering jurisdictional issues under the UCCJEA.

Michigan courts are strongly urged to communicate with other state courts when determining which court has the most convenient forum. Model Act, Section 210, Comment. See Section 13.7 for information on the UCCJEA’s requirements for judicial communication.

Unlike the UCCJA, the UCCJEA does not provide that the court should simply dismiss the case if it determines that it is an inconvenient forum. Instead, the UCCJEA provides that the court must stay the proceedings and order that a child-custody proceeding be promptly commenced in another state. The court may also impose other conditions it deems necessary. MCL 722.1207(3).

## 2. Child-Custody Determination Incidental to Another Action

A court may decline to exercise its jurisdiction under the UCCJEA if “a child-custody determination\* is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.” MCL 722.1207(4).

\*See the beginning of Section 13.5 for the definition of “child-custody determination.”

### 3. Petitioner Engaged in Unjustifiable Conduct

A Michigan court *must* decline jurisdiction under the UCCJEA if the court finds that the petitioner has engaged in “unjustifiable conduct.” MCL 722.1208(1) provides:

“(1) Except as otherwise provided in [MCL 722.1204, governing “temporary emergency” jurisdiction\*] or by other law of this state, if a court of this state has jurisdiction under this act because a person invoking the court’s jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless the court finds 1 or more of the following:

\*See Section 13.5(B)(4) for more information.

“(a) The parents and all persons acting as parents\* have acquiesced in the exercise of jurisdiction.

\*See Section 13.5(B)(1) for the definition of “persons acting as parents.”

“(b) A court of the state otherwise having jurisdiction under [MCL 722.1201 to 722.1203] determines that this state is a more appropriate forum under [MCL 722.1207].

“(c) No court of another state would have jurisdiction under [MCL 722.1201 to 722.1203].”

MCL 722.1201 to 722.1203 govern “home state,” “significant connection,” “last resort,” and exclusive continuing jurisdiction.

“Unjustifiable conduct” is not defined in the UCCJEA. However, the Model Act, Section 208, Comment, provides the following guidance:

“[T]here are still a number of cases where parents, or their surrogates, act in a reprehensible manner, such as removing, secreting, retaining, or restraining the child. This section ensures that abducting parents will not receive an advantage for their unjustifiable conduct. If the conduct that creates the jurisdiction is unjustified, courts must decline to exercise jurisdiction that is inappropriately invoked by one of the parties. For example, if one parent abducts the child pre-decree and establishes a new home State, that jurisdiction will decline to hear the case. There are exceptions. If the other party has acquiesced in the court’s jurisdiction, the court may hear the case. Such acquiescence may occur by filing a pleading submitting to the jurisdiction, or by not filing in the court that would otherwise have jurisdiction under this Act. Similarly, if the court that would have jurisdiction finds that the court of this State is a more appropriate forum, the court may hear the case.

“This section applies to those situations where jurisdiction exists because of the unjustified conduct of the person seeking to invoke it. If, for example, a parent in the State with exclusive, continuing jurisdiction under Section 202 has either restrained the child from

visiting with the other parent, or has retained the child after visitation, and seeks to modify the decree, this section [is] inapplicable. The conduct of restraining or retaining the child did not create jurisdiction. Jurisdiction existed under this Act without regard to the parent's conduct. Whether a court should decline to hear the parent's request to modify is a matter of local law.

“The focus in this section is on the unjustified conduct of the person who invokes the jurisdiction of the court. A technical illegality or wrong is insufficient to trigger the applicability of this section. This is particularly important in cases involving domestic violence and child abuse. *Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal.* Thus, if a parent flees with a child to escape domestic violence and in the process violates a joint custody decree, the case should not be automatically dismissed under this section. An inquiry must be made into whether the flight was justified under the circumstances of the case. However, an abusive parent who seizes the child and flees to another State to establish jurisdiction has engaged in unjustifiable conduct and the new State must decline to exercise jurisdiction under this section.” [Emphasis added.]

See *In the Interest of SLP*, 123 SW3d 685 (Tex App, 2003), for a case illustrating “unjustifiable conduct.” In *SLP*, the Texas Court of Appeals applied the provision of the Texas UCCJEA that requires the court to decline jurisdiction if the petitioner has engaged in “unjustifiable conduct.” The Court held that parental kidnapping, lying to the court, and violating numerous court orders constituted “unjustifiable conduct” and declined jurisdiction.

If the court declines to exercise its jurisdiction due to the petitioner's unjustifiable conduct, “the court may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child-custody proceeding is commenced in a court having jurisdiction under [MCL 722.1201 to 722.1203].” MCL 722.1208(2). The Model Act, Section 208, Comment, provides the following guidance:

“Subsection (b) authorizes the court to fashion an appropriate remedy for the safety of the child and to prevent a repetition of the unjustified conduct. Thus, it would be appropriate for the court to notify the other parent and to provide for foster care for the child until the child is returned to the other parent. The court could also stay the proceeding and require that a custody proceeding be instituted in another State that would have jurisdiction under this Act. It should be noted that the court is not making a forum non conveniens analysis in this section. If the conduct is unjustifiable, it must decline jurisdiction. It may, however, retain jurisdiction

until a custody proceeding is commenced in the appropriate tribunal if such retention is necessary to prevent a repetition of the wrongful conduct or to ensure the safety of the child.”

If a court dismisses a petition or stays a proceeding because it declines to exercise jurisdiction based upon the petitioner’s unjustifiable conduct, the court must charge the petitioner with the “necessary and reasonable expenses including costs, communication expenses, attorney fees, investigative fees, witness expenses, travel expenses, and child care expenses during the course of the proceedings, unless the party from whom expenses and fees are sought establishes that the award would be clearly inappropriate.” MCL 722.1208(3). However, the court may not assess fees, costs, or expenses against the state of Michigan unless authorized by law other than the UCCJEA. MCL 722.1208(3).

### **13.6 Required Notice Before Making a Child-Custody Determination Under the UCCJEA**

Before a court makes a child-custody determination under the UCCJEA, a petitioner must provide notice to the proper persons. MCL 722.1205(1) states:

“Before a child-custody determination is made under this act, notice and an opportunity to be heard in accordance with the standards of [MCL 722.1108] must be given to each person entitled to notice under the law of this state as in child-custody proceedings between residents of this state, a parent whose parental rights have not been previously terminated, and a person having physical custody of the child.”

MCL 722.1108 contains the following requirements for serving notice on persons outside of Michigan:

“(1) Notice required for the exercise of jurisdiction when a person is outside this state may be given in a manner prescribed by the law of this state for service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice, but may be by publication if other means are not effective.

“(2) Proof of service may be made in the manner prescribed by the law of this state or by the law of the state in which the service is made.

“(3) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court.”

If a person has received proper notice and an opportunity to be heard, he or she is bound by a custody determination made under the UCCJEA. MCL 722.1106 states:

“A child-custody determination made by a court of this state that had jurisdiction under this act binds all persons who have been served in accordance with the laws of this state or notified in accordance with [MCL 722.1108] or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those persons, the child-custody determination is conclusive as to all decided issues of law and fact except to the extent the child-custody determination is modified.”

A child-custody determination made without notice and an opportunity to be heard is not enforceable under the UCCJEA. MCL 722.1205(2). Therefore, ex parte orders granted by a court are not entitled to interstate enforcement or nonmodification under the UCCJEA. Model Act, Section 205, Comment.

\*See MCL 722.1109(3) for information regarding limitations on this immunity.

A party responding to a child-custody proceeding under the UCCJEA may appear and participate in the proceeding without submitting to personal jurisdiction for another proceeding or purpose. MCL 722.1109(1).<sup>\*</sup> A party is not subject to personal jurisdiction in Michigan solely by being present in the state for the purpose of participating in a proceeding under the UCCJEA. If the party is subject to personal jurisdiction in this state on a basis other than his or her physical presence, then that party may be served with process in Michigan. MCL 722.1109(2). These provisions provide limited immunity for persons to appear in a custody action without submitting to jurisdiction for a tort or support action.

The notice provisions in MCL 722.1108 and 722.1109 provide protection for a domestic violence survivor and her children who flee from the state that issued a custody order to a refuge state. If the abuser files an action in the home state to enforce the custody order, the survivor is more likely to receive actual notice of the action under MCL 722.1108 and avoid exposure to parental kidnapping charges. Dunford-Jackson, *The Uniform Child Custody Jurisdiction and Enforcement Act: Affording Enhanced Protection for Victims of Domestic Violence and Their Children*, 50 *Juvenile and Family Court Journal* 55 (1999), in Lemon, *Domestic Violence Law*, p 367 (West, 2001). If the abuser flees with the children to a new state in an attempt to coerce the victim to submit to his control, MCL 722.1109 allows the victim to engage in the custody contest in the court of the “new” state without submitting to that court’s jurisdiction over the other aspects of the case. Lemon, *Domestic Violence Law*, p 368 (West, 2001).

## 13.7 Judicial Communication Under the UCCJEA

When the parties to a relationship involving domestic violence bring their child-custody dispute before multiple courts, communication between these

courts is vital to prevent violence and manipulation of the judicial system. Recognizing that a judge needs complete information about the parties' situation in order to adequately meet their needs, the UCCJEA provides procedures for the communication and sharing of information between courts.

A Michigan court may communicate with a court in another state concerning any proceeding arising under the UCCJEA. MCL 722.1110(1).

## A. When Communication is Required

Communication between a Michigan court and another state's court is *required* in the following circumstances:

- ♦ If a Michigan court has been asked to take "temporary emergency" jurisdiction\* to make a child-custody determination and a child-custody proceeding has been commenced in or a child-custody determination has been made by another court having jurisdiction (pursuant to MCL 722.1201–722.1203). MCL 722.1204(4).
- ♦ If a Michigan court determines that at the time of the commencement of the proceedings, a child-custody proceeding has been commenced in a court in another state having jurisdiction pursuant to the UCCJEA. MCL 722.1206(2). (MCL 722.1209(1)(a) requires the pleading in a child-custody determination to include information regarding previous child-custody proceedings.\*)
- ♦ If a Michigan court has been asked to enforce a child-custody determination and the Michigan court determines that a proceeding to modify the child-custody determination has been commenced in another state having jurisdiction to modify the child-custody determination.\* MCL 722.1306.

Although a Michigan court is required to communicate with other courts in these circumstances, Michigan courts may also communicate with courts in other circumstances. MCL 722.1110(1). The Model Act, Section 210, Comment, strongly urges courts to communicate with other state courts when determining which court has the most convenient forum.\*

## B. Required Procedures

MCL 722.1110 governs the communications between courts of different states and the participation of the parties in those communications. MCL 722.1110(2) states:

"The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, the parties shall be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made."

\*See Section 13.5(B)(4) for more information on "temporary emergency" jurisdiction.

\*See Section 13.5(A) for pleading requirements.

\*See Section 13.9 for information on the enforcement of a child-custody determination.

\*See Section 13.5(E)(1) for more information on determining the most convenient forum.

Except as noted below, a record must be made of communication between a Michigan court and a court of another state. MCL 722.1110(3). The court must also promptly inform the parties of the communication and grant the parties access to the record of the communication. *Id.*

Communication between courts regarding schedules, calendars, court records, or “similar matters” may occur without informing the parties. MCL 722.1110(3). The court is not required to make a record of these communications. MCL 722.1110(3).

For the purposes of MCL 722.1110, a “record” means “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” MCL 722.1110(5). A record includes each of the following:

“(a) Notes or transcripts of a court reporter who listened to a conference call between the courts.

“(b) An electronic recording of a telephone call.

“(c) A memorandum or electronic record of a communication between the courts.

“(d) A memorandum or electronic record of a communication between the courts that a court makes after the communication.” MCL 722.1110(5)(a)-(d).

### **C. Preservation of Records Under the UCCJEA**

The UCCJEA requires the preservation of certain records. MCL 722.1112(4) states:

“A court of this state shall preserve the pleadings, orders, decrees, records of hearings, evaluations, and other pertinent records with respect to a child-custody proceeding until the child attains 18 years of age. Upon appropriate request by a court or law enforcement official of another state, the court shall forward a certified copy of these records.”

## **13.8 Registration and Confirmation of a Child-Custody Order Under the UCCJEA**

A child-custody determination issued by a court in another state may be registered in Michigan. MCL 722.1304(1). There is no fee for registering a child-custody determination in Michigan. MCR 3.214(D).

Registration of the order is not a prerequisite to enforcement. MCL 722.1303(2). However, as explained below, registration and confirmation of a child-custody order precludes certain defenses to enforcement of the order.

In order to register an out-of-state child-custody order all of the following must be sent to the circuit court in this state:

“(a) A letter or other document requesting registration.

“(b) Two copies, including 1 certified copy, of the child-custody determination sought to be registered, and a statement under penalty of perjury that, to the best of the knowledge and belief of the person seeking registration, the child-custody determination has not been modified.

“(c) Except as otherwise provided in [MCL 722.1209\*], the name and address of the person seeking registration and of each parent or person acting as a parent who has been awarded custody or parenting time in the child-custody determination sought to be registered.” MCL 722.1304(1).

\*MCL 722.1209 governs confidentiality and pleadings. See Section 10.4 for more information on confidentiality.

See Section 13.5(B)(1) for the definition of “person acting as a parent.”

An out-of-state order may be registered with or without a simultaneous request for enforcement. MCL 722.1304(1). See Section 13.9 for information regarding the enforcement of an out-of-state child-custody order.

## A. Notice of Requested Registration

Once the court receives the documents required by MCL 722.1304(1), the registering court must do both of the following:

“(a) Cause the child-custody determination to be filed as a foreign judgment, together with 1 copy of any accompanying documents and information, regardless of form.

“(b) Serve notice upon the persons named under [MCL 722.1304(1)(c)] and provide them with an opportunity to contest the registration in accordance with this section.” MCL 722.1304(2).

The persons named in MCL 722.1304(1)(c) are the following:

- ♦ the person seeking registration of the order, and
- ♦ each parent or person acting as a parent\* who has been awarded custody or parenting time in the child-custody determination.

The notice required by MCL 722.1304(2)(b) must state all of the following:

\*For the definition of “person acting as a parent,” see Section 13.5(B)(1).

“(a) A registered child-custody determination is enforceable as of the date of the registration in the same manner as a child-custody determination issued by a court of this state.

“(b) A hearing to contest the validity of the registered child-custody determination must be requested within 21 days after service of notice.

\*See SCAO  
Form FOC 99.

“(c) Failure to contest the registration will result in confirmation of the child-custody determination and preclude further contest of that child-custody determination with respect to a matter that could have been asserted.” MCL 722.1304(3).\*

## **B. Contesting Registration of an Out-of-State Child-Custody Determination**

A person contesting the registration of an out-of-state child-custody determination must request a hearing within 21 days after receiving notice of the proposed registration. MCL 722.1304(4).

\*See SCAO  
Form FOC 99a.

If a timely request for a hearing to contest the registration is not made, MCL 722.1304(5) provides that “the registration is confirmed as a matter of law, and the person requesting registration and each person served must be notified of the confirmation.”\*

If a timely request for a hearing is made, then MCL 722.1304(4) states that “[a]t the hearing, the court must confirm the registered child-custody determination unless the person contesting the registration establishes one of the following:

\*See Section  
13.5.

“(a) The issuing court did not have jurisdiction under article 2.\*

“(b) The child-custody determination sought to be registered has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under article 2.

\*See Section  
13.6.

“(c) The person contesting registration was entitled to notice in the proceedings before the court that issued the child-custody determination for which registration is sought, but notice of those proceedings was not given in accordance with the standards of section 108.\*”

If the person contesting the registration does not establish one of the above reasons for not confirming the registration, then the court must confirm the child-custody registration. MCL 722.1304(6). Once the court confirms a child-custody determination, the child-custody determination may not be contested with respect to any matter that could have been asserted at the time of the registration. *Id.*

## 13.9 Enforcement Proceedings Under the UCCJEA

Unlike the UCCJA and the PKPA, the UCCJEA establishes a procedure for swift enforcement of a child-custody order. If the court that issued a custody order exercised its jurisdiction in compliance with the UCCJEA, the respondent was given notice and an opportunity to be heard before the order was issued, and the order has not been vacated, stayed, or modified, the petitioner is entitled to immediate custody of a child under the order.

Article 3 of Michigan's UCCJEA, MCL 722.1301–722.1316, may be invoked to enforce the following:

- ♦ A child-custody determination\*; and
  - ♦ An order for the return of a child made under the Hague Convention\* on the civil aspects of international child abduction. MCL 722.1302.
- Note:** For an order to be enforceable under the UCCJEA, the issuing state must have exercised jurisdiction and provided notice and an opportunity to be heard in compliance with the UCCJEA. MCL 722.1303(1). However, there is no requirement that the issuing state have adopted the UCCJEA.

\*See Section 13.5 for the definition of “child-custody” determination.

\*See Sections 13.17–13.19 for more information on the Hague Convention.

A Michigan court that does not have jurisdiction to modify a child-custody determination may issue a temporary order enforcing either of the following:

- ♦ A parenting time schedule made by a court of another state;
- ♦ The parenting time provisions of a child-custody determination of another state that does not provide for a specific parenting time schedule. MCL 722.1302(2).

If the court issues a temporary order pursuant to MCL 722.1302, the court must specify in the order a period that it considers adequate to allow the petitioner to obtain an order from a court having jurisdiction pursuant to the UCCJEA. MCL 722.1302(3). A temporary order remains in effect until an order is obtained from the other court or the period expires. *Id.*

### A. Petition for Enforcement of Child-Custody Determination Under the UCCJEA

A party must file a petition in order to enforce a child-custody determination. Pursuant to MCL 722.1307(2), the petition must state all of the following:

“(a) Whether the court that issued the child-custody determination identified the jurisdictional basis it relied upon in exercising jurisdiction and, if so, what the basis was.

\*See Section 13.8 for information regarding the registration of child-custody determinations.

“(b) Whether the child-custody determination for which enforcement is sought has been vacated, stayed, or modified by a court whose decision must be enforced under this act or federal law and, if so, identify the court, the case number of the proceeding, and the action taken.

“(c) Whether a proceeding has been commenced that could affect the current proceeding, including a proceeding relating to domestic violence, a protective order, termination of parental rights, or adoption and, if so, identify the court and the case number and nature of the proceeding.

“(d) The present physical address of the child and the respondent, if known.

“(e) Whether relief in addition to the immediate physical custody of the child and attorney fees is sought, including a request for assistance from law enforcement officials and, if so, the relief sought.

“(f) If the child-custody determination has been registered and confirmed under [MCL 722.1304\*], the date and place of registration.”

The petition must be verified and accompanied by the following:

- ♦ a certified copy of the child-custody determination sought to be enforced, and
- ♦ the order, or a certified copy of the order, confirming registration (if any). MCL 722.1307(1).

**Application for Warrant to Take Physical Custody of a Child.** The petitioner may also file a verified application for the issuance of a warrant to take physical custody of a child if the child is likely to suffer serious imminent physical harm or be removed from the state. MCL 722.1310(1).

Upon the testimony of the petitioner or other witness, if the court finds that the child is likely to suffer serious imminent physical harm or be imminently removed from this state, the court may issue a warrant to take physical custody of the child. MCL 722.1310(2). If the court issues a warrant, the court must hold a hearing on the petition on the next judicial day after the warrant is executed. *Id.*

A warrant issued under MCL 722.1310 must include the same statements that are required under MCL 722.1307(2) to be contained in a petition for enforcement of a child-custody determination. These statements are listed above. MCL 722.1310(2).

A warrant to take physical custody must also include, at least, the following:

“(a) A recitation of the facts upon which a conclusion of serious imminent physical harm or imminent removal from the jurisdiction is based.

“(b) An order directing law enforcement officers to take physical custody of the child immediately.

“(c) Provisions for the placement of the child pending final relief.”  
MCL 722.1310(3).

The respondent must be served with the petition, warrant, and order immediately after the child is taken into physical custody. MCL 722.1310(4).

**Law Enforcement Participation.** MCL 710.1310 also provides:

“(5) A warrant to take physical custody of a child is enforceable throughout this state. If the court finds on the basis of the testimony of the petitioner or another witness that a less intrusive remedy is not effective, the court may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances, the court may authorize law enforcement officers to make a forcible entry at any hour.

“(6) The court may impose conditions upon placement of a child to ensure the appearance of the child and the child’s custodian.”

## B. Notice and Hearing

Upon the filing of a petition for enforcement of a child-custody determination, the court must issue “an order directing the respondent to appear with or without the child at a hearing and may enter *any order necessary to ensure the safety of the parties and the child.*” MCL 722.1307(3).[Emphasis added.] The order directing the respondent to appear “must state the time and place of hearing and must advise the respondent that at the hearing the court will order the delivery of the child and the payment of fees, costs, and expenses under [MCL 722.1311], and may schedule an additional hearing to determine whether further relief is appropriate, unless the respondent appears and establishes either of the following:

“(a) The child-custody determination has not been registered and confirmed under [MCL 722.1304\*] and 1 or more of the following:

\*See Section  
13.8.

\*See Section 13.5 for information regarding jurisdiction under MCL 722.1201 et seq.

\*See Section 13.6 for information on notice pursuant to MCL 722.1108.

\*See Section 13.8.

\*See Sections 13.17-13.19 for information on the Hague Convention.

(i) The issuing court did not have jurisdiction under [MCL 722.1201–722.1210].\*

(ii) The child-custody determination for which enforcement is sought has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under [MCL 722.1201–722.1210] or federal law.

(iii) The respondent was entitled to notice, but notice was not given in accordance with the standards of [MCL 722.1108\*] in the proceedings before the court that issued the order for which enforcement is sought.

“(b) The child-custody determination for which enforcement is sought was registered and confirmed under [MCL 722.1304], but has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under [MCL 722.1201–722.1210] or federal law.”

If the order has been registered and confirmed,\* the only defense that a respondent may raise is that the order has been subsequently vacated, stayed, or modified by a court having proper jurisdiction. MCL 722.1304(6).

The petition and order must be served “by a method authorized by the law of this state” upon the respondent and any person who has physical custody of the child. MCL 722.1308. MCL 722.1301 defines “respondent” as “a person against whom a proceeding has been commenced for enforcement of a child-custody determination or enforcement of an order for the return of a child under the Hague Convention on the civil aspects of international child abduction.\*”

MCR 3.214(A) provides that actions under the UCCJEA are governed by the rules applicable to other civil actions, except as otherwise provided by the UCCJEA and MCR 3.214. MCR 2.105 governs process and manner of service in civil actions and, in relevant part, states:

“(A) Individuals. Process may be served on a resident or nonresident individual by

“(1) delivering a summons and a copy of the complaint to the defendant personally; or

“(2) sending a summons and a copy of the complaint by registered or certified mail, return receipt requested, and delivery restricted to the addressee. Service is made when the defendant acknowledges receipt of the mail. A copy of the return receipt signed by the defendant must be attached to proof showing service under subrule (A)(2).

...

“(I) Discretion of the Court.

“(1) On a showing that service of process cannot reasonably be made as provided by this rule, the court may by order permit service of process to be made in any other manner reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard.

“(2) A request for an order under the rule must be made in a verified motion dated not more than 14 days before it is filed. The motion must set forth sufficient facts to show that process cannot be served under this rule and must state the defendant’s address or last known address, or that no address of the defendant is known. If the name or present address of the defendant is unknown, the moving party must set forth facts showing diligent inquiry to ascertain it. A hearing on the motion is not required unless the court so directs.

“(3) Service of process may not be made under this subrule before entry of the court’s order permitting it.”

The court must hold the hearing on the next judicial day after service of the order, unless that date is “impossible.” If that date is “impossible,” then the court must hold the hearing on the first judicial day possible. The court may extend the date of the hearing at the request of the petitioner. MCL 722.1307(3).

At the hearing, if a party is called to testify but refuses to answer because the testimony may be self-incriminating, the court may draw an adverse inference from the refusal. MCL 722.1309(3).

The spousal privilege, protecting communication between spouses, can not be used at an enforcement proceeding under the UCCJEA. Likewise, a defense of immunity based on the relationship of husband and wife or parent and child cannot be invoked in an enforcement proceeding under the UCCJEA. MCL 722.1309(4). For more information on gathering evidence under the UCCJEA, see Section 13.10.

If the court finds the petitioner is entitled to custody, then the court must order the return of the child to the petitioner. MCL 722.1309(1). The court must also:

“ . . . award the fees, costs, and expenses authorized under [MCL 722.1311] and may grant additional relief, including a request for the assistance of law enforcement officials, and schedule a further hearing to determine whether additional relief is appropriate.”

See Section 13.11 for information on MCL 722.1311 and the assessment of fees and costs pursuant to the UCCJEA.

## C. Appeals of Final Orders in Enforcement Proceedings

An appeal of a final order issued in an enforcement proceeding under the UCCJEA is subject to expedited appellate procedures. MCL 722.1313 states:

\*See Section 13.5(B)(4) for information on “temporary emergency” jurisdiction.

“An appeal may be taken from a final order in a proceeding under this article [article 3, governing enforcement procedures] in accordance with expedited appellate procedures in other civil cases. Unless the court enters a temporary emergency order under section 204,\* the enforcing court may not stay an order enforcing a child-custody determination pending appeal.”

## 13.10 Gathering Evidence Safely From the Parties Under the UCCJEA

In interstate cases involving domestic abuse, the logistical problems with gathering evidence are exacerbated by the potential for further violence and the possibility that the abusive party may manipulate the proceedings as a tactic for asserting control. To decrease the risk of violence, courts can utilize procedures under the UCCJEA that permit the taking of evidence while the parties are separated. Where the parties appear at a hearing, a court may enter orders to ensure their safety. To deter abusive manipulation of the proceedings, courts can assess certain costs of interstate litigation against one of the parties where justice requires.

### A. Judicial Cooperation in Evidence Gathering

The following procedures can be used to gather evidence from another state:

- ♦ In addition to other procedures available to a party, testimony of witnesses may be taken by deposition or other means allowable in this state for testimony taken in another state. MCL 722.1111(1).
- ♦ One court may request another to assist with evidence-gathering in a variety of ways: holding hearings to receive evidence; ordering a party to produce or give evidence; ordering an evaluation with respect to custody of the child involved; and ordering a party or person having physical custody of the child to appear in the proceeding with or without the child. The assisting court may then forward certified copies of hearing transcripts, evidence, or evaluations prepared in compliance with the request. MCL 722.1112(1)(a)–(e).

The court may order testimony on its own motion and may prescribe the manner and terms upon which the testimony is taken. MCL 722.1111(1). A Michigan court may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means. MCL 722.1111(2). A Michigan court must cooperate with courts of other states in designating an appropriate location for a deposition or

testimony. *Id.* For more information on communication between courts, see Section 13.7.

MCL 722.1111(3) provides:

“Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.”

The court may assess the travel and other “necessary and reasonable expenses” incurred under MCL 722.1112(1) or (2) against the parties according to Michigan law. MCL 722.1112(3). See Section 13.11 for more information on assessing costs.

## B. Ensuring the Safety of Parties Ordered to Appear at a Hearing

A Michigan court may enter any orders necessary “to ensure the safety of the child or of a person ordered to appear. . . .” MCL 722.1210(3). The court has the authority to order a party to personally appear at a child-custody proceeding with or without the child. MCL 722.1210(1)-(2).

If the party whose presence is ordered by the court lives outside of Michigan, the court must order that notice be provided to that person in accordance with MCL 722.1108\* and must provide that failure to appear may result in a decision adverse to that party. MCL 722.1210(2). If the court orders an out-of-state party to appear before the court, the court may require another party to pay the “reasonable and necessary travel and other expenses of the party directed” to appear. MCL 722.1210(4).

\*See Section 13.6 for information on notice pursuant to MCL 722.1108.

## 13.11 Assessing Costs Under the UCCJEA

To prevent abusive parties from manipulating the proceedings, courts can assess certain costs of interstate litigation against them:

- ♦ If a court declines to exercise jurisdiction because the person invoking the court’s jurisdiction has engaged in unjustifiable conduct,\* the court shall order that party to pay the “necessary and reasonable expenses including costs, communication expenses, attorney fees, investigative fees, witness expenses, travel expenses, and child care expenses during the course of the proceedings, unless the party from whom expenses and fees are sought establishes that the award would be clearly inappropriate.” MCL 722.1208(3).

\*See Section 13.5(E)(3) for information on “unjustifiable conduct.”

**Note:** The court may not assess fees, costs, or expenses against the state of Michigan unless authorized by law other than the UCCJEA. MCL 722.1208(3).

\*“Prevailing party” should be defined according to state law. See Model Act, Section 312, Comment, and MCR 2.625(B).

- ♦ The court shall award the prevailing party,\* including a state, the necessary and reasonable expenses incurred by or on behalf of the party including costs, communication expenses, attorney fees, investigative fees, witness expenses, travel expenses, and child care expenses during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate. MCL 722.1311(1).

**Note:** MCL 722.1311(2) provides that the “court shall not assess fees, costs, or expenses against a state except as otherwise provided by law other than this act.”

MCL 722.1316 states:

“If the respondent is not the prevailing party, the court may assess against the respondent all direct expenses and costs incurred by the prosecutor or attorney general and law enforcement officers . . . .”

## 13.12 Jurisdiction Under the PKPA

In 1980, the U.S. Congress enacted the PKPA. The PKPA was adopted to fill gaps in the law left by the UCCJA and to afford full faith and credit to the orders of all states, including those that did not adopt the UCCJA. Further, the PKPA was enacted to prevent jurisdictional conflict and competition over child custody and to deter parents from abducting children for the purpose of obtaining a custody award in a different jurisdiction. *Cunningham v Cunningham*, 719 SW2d 224, 227 (Tex App, 1986) and *Peterson v Peterson*, 464 A2d 202, 204 (Me, 1983). The UCCJEA was developed after the PKPA to address legal issues that still arose concerning the UCCJA. The UCCJEA and the PKPA are now substantially consistent with regard to jurisdiction and notice. Thus, if an order is entitled to full faith and credit under the UCCJEA, it is entitled to full faith and credit under the PKPA. Because of this, only significant differences between the two acts are noted in this section. More importantly, the PKPA preempts the UCCJEA if they conflict. On federal preemption, see *People v Hegedus*, 432 Mich 598, 620-622 (1989). A discussion of the federal preemption doctrine is outside of the scope of this benchbook.

The PKPA requires Michigan courts to give full faith and credit to sister state custody and visitation determinations that meet the statute’s notice and jurisdictional standards:

“The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in . . . this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.” 28 USC 1738A(a).

“Custody determinations” are defined as “a judgment, decree, or other order of a court providing for the custody of a child, and include[] permanent and temporary orders, and initial orders and modifications.” 28 USC 1738A(b)(3). A “visitation determination” is “a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications.” 28 USC 1738A(b)(9).

**Note:** Although Indian tribes are not mentioned in the definition of “state” that appears in the PKPA at 28 USC 1738A(b)(8), a federal appeals court has held that Indian tribes are subject to its provisions. *In re Larch* 872 F2d 66, 68 (CA 4, 1989). This construction is consistent with 28 USC 1738B, which specifically applies to Indian tribes and provides for full faith and credit to child support orders made consistently with its provisions.

## A. “Home State” Jurisdiction

The PKPA provides for “home state” jurisdiction as follows:

“[S]uch State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child’s home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State . . .” 28 USC 1738A(c)(2)(A).

A “contestant” is “a person, including a parent or grandparent, who claims a right to custody or visitation of a child.” 28 USC 1738A(b)(2).

The “home state” is defined in as follows:

“‘[H]ome State’ means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period.” 28 USC 1738A(b)(4).

A “person acting as parent” means “a person, other than a parent, who meets both of the following criteria:

“(i) Has physical custody of the child or has had physical custody for a period of 6 consecutive months, including a temporary absence, within 1 year immediately before the commencement of a child-custody proceeding.

“(ii) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state.” MCL 722.1102(m).

## B. “Significant Connection” Jurisdiction

The PKPA provides for “significant connection” jurisdiction where:

“(i) it appears that no other State would have [“home state” jurisdiction], and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child’s present or future care, protection, training, and personal relationships. . . .” 28 USC 1738A(c)(2)(B).

A “contestant” is “a person, including a parent or grandparent, who claims a right to custody or visitation of a child.” 28 USC 1738A(b)(2).

“Significant Connection” jurisdiction under the PKPA differs from “significant connection” jurisdiction under the UCCJEA in two significant ways. First, the PKPA provides that “at least one contestant” has a significant connection with the state. The definition of a contestant includes a parent or a grandparent who claims a right to custody or visitation. The UCCJEA requires that a child and the child’s parents, parent, or person acting as a parent have a significant connection to the state. The UCCJEA’s definition does not include a grandparent, unless that grandparent is “acting as a parent.”\*

Second, the PKPA requires a court to consider whether it would be in the best interest of the child to assume jurisdiction. The UCCJEA does not require the court to determine the best interest of the child. MCL 722.1201(1)(b). For more information on “significant connection” jurisdiction pursuant to the UCCJEA, see Section 13.5(B)(2).

## C. “Last Resort” Jurisdiction

The PKPA provides for “last resort” jurisdiction where:

“(i) it appears that no other State would have [home state, significant connection, emergency, or continuing jurisdiction\*], or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction.” 28 USC 1738A(c)(2)(D).

To assert “last resort” jurisdiction under the PKPA, a Michigan court must make the following determinations:

\*For the definition of a person “acting as a parent” see Section 13.12(A).

\*Continuing jurisdiction arises after a court has made an initial child custody or visitation determination consistently with the PKPA. See Section 13.12(E).

- ♦ No other court has “home state,” “significant connection,” “emergency,” or continuing jurisdiction; *or*
- ♦ A court with “home state,” “significant connection,” “emergency,” or continuing jurisdiction has declined to exercise it because Michigan is a more appropriate forum;\* *and*
- ♦ It is in the best interest of the child for a Michigan court to assume jurisdiction.

**Note:** Although the requirements for “last resort” jurisdiction under the PKPA and the UCCJEA are substantially similar, the PKPA requires the court to determine if it is in the best interest of the child for a Michigan court to assume jurisdiction. The UCCJEA does not contain a best interest requirement. See Section 13.5(B)(3) for more information on “last resort” jurisdiction pursuant to the UCCJEA.

\*Grounds for declining to exercise jurisdiction are discussed in Section 13.5(E).

## D. “Emergency” Jurisdiction

In applying the PKPA jurisdictional standards in cases where domestic violence is at issue, the provisions for emergency jurisdiction in 28 USC 1738A(c)(2)(C) are of particular significance. The PKPA provides for “emergency” jurisdiction as follows:

“[T]he child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child *because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse.* . . .”  
28 USC 1738A(c)(2)(C). [Emphasis added.]

In *Bull v Bull*, 109 Mich App 328, 342-343 (1981), overruled on other grounds 442 Mich 648, 675 (1993), the Court of Appeals held that a Michigan circuit court had emergency jurisdiction where a party alleged that her former spouse had abused her and threatened to take the child out of the country.

## E. Continuing Jurisdiction

The PKPA contains the following provision for continuing jurisdiction:

“The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as [such court continues to have jurisdiction under the laws of such State] and such State remains the residence of the child or of any contestant.”\* 28 USC 1738A(d).

Under the PKPA’s continuing jurisdiction provision, the initial court’s jurisdiction continues to the exclusion of all others as long as:

- ♦ The initial court has jurisdiction under its own laws;

\*A “contestant” is “a person, including a parent or grandparent, who claims a right to custody or visitation of a child.” 28 USC 1738A(b)(2).

- ♦ The initial determination was made consistently with the notice and jurisdictional requirements of the PKPA; and
- ♦ The initial court's state remains the residence of the child or of any contestant.

For a case in which the Michigan court's jurisdiction over a child-custody dispute was excluded by another state's continuing jurisdiction under the PKPA, see *In re Clausen*, 442 Mich 648, 671-674 (1993).

\*For the definition of person "acting as a parent" see Section 13.5(B)(1).

**Note:** Continuing jurisdiction under the PKPA differs from continuing jurisdiction under the UCCJEA. The PKPA provides that jurisdiction continues as long as the residence of the child or "any contestant" remains in the state. The definition of a contestant includes a parent or a grandparent who claims a right to custody or visitation. Continuing jurisdiction under the UCCJEA requires a child and a parent or person acting as a parent to continue to reside in the state. The UCCJEA's definition does not include a grandparent, unless that grandparent is "acting as a parent."\* For more information on continuing jurisdiction under the UCCJEA see Section 13.5(C).

## **F. Modification of Another Court's Order When It No Longer Has Jurisdiction or Declines to Exercise Jurisdiction**

Under the PKPA, modification of another court's custody decree or judgment will not be given full faith and credit, except in cases meeting the following prerequisites:

- "(1) [The modifying court] has jurisdiction to make such a child custody determination; and
- "(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination." 28 USC 1738A(f).

Similarly, modification of another court's visitation determination will not be given full faith and credit unless "the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination." 28 USC 1738A(h).

## **13.13 Notice Under the PKPA**

Pursuant to 28 USC 1738A(e), before a court may make a child custody or visitation determination, "reasonable notice and an opportunity to be heard" must be provided to all of the following:

- ♦ the contestants,

- ♦ any parent whose parental rights have not been previously terminated, and
- ♦ any person who has physical custody of a child.

### 13.14 Simultaneous Proceedings Under the PKPA

In some cases, a litigant may file a custody or parenting time petition in Michigan after his or her opponent has filed a similar petition in another jurisdiction, but before the other court has made its determination. If the Michigan court exercises jurisdiction in this situation, the PKPA will not accord full faith and credit to the Michigan court's orders:

“A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.” 28 USC 1738A(g).

See Section 13.5(D) for a discussion of simultaneous proceedings under the UCCJEA when one court has a petition to modify a child-custody determination and another court has a petition to enforce a child-custody determination.

### 13.15 State and Federal Authorities Governing International Cases

When a child is brought into the United States from another country, two civil remedies are available in Michigan courts to secure access to the child:

- ♦ **The Uniform Child-Custody Jurisdiction and Enforcement Act (“UCCJEA”), MCL 722.1101 et seq.**

The UCCJEA provides for Michigan courts to enforce foreign nation custody decrees that meet the Act's jurisdictional and notice standards. It applies regardless of whether the foreign nation has adopted the UCCJEA.

- ♦ **The Hague Convention on the Civil Aspects of International Child Abduction, 42 USC 11601-11611.**

Under the Hague Convention, a party in a foreign nation may seek the return of a child under 16 who has been wrongfully taken from the nation of his or her habitual residence and brought to the United States. The Convention also provides for the enforcement of visitation rights to children in the United States. The Michigan courts have concurrent jurisdiction with the federal courts to hear actions under the Convention. Relief is available in cases where both the nation of the child's habitual

residence and the nation where the child is located have acceded to the Convention. In such cases, the Convention, as implemented by the federal statutes, preempts the UCCJEA.

The following sections provide an overview of the above statutes, with particular attention to domestic violence as a factor in affording relief.

**Note:** For federal criminal penalties for international child abduction, see 18 USC 1073 and 1204. See Section 3.5 on Michigan's parental kidnapping statute. Section 12.10 addresses measures courts can take in cases where there is a risk of parental abduction or flight.

### 13.16 Applying the UCCJEA to International Cases

Under the UCCJEA, a Michigan court must treat a foreign country in the same manner it would treat another state for the purposes of the general and jurisdictional provisions of the UCCJEA contained in MCL 722.1101–722.1210. MCL 722.1105(1). A child-custody determination made in a foreign country must be recognized and enforced under MCL 722.1301 et seq. if the foreign child-custody determination was made “under factual circumstance in substantial conformity with the jurisdictional standards” of the UCCJEA. MCL 722.1105(2). A Michigan court does not have to apply the UCCJEA if the child-custody law of the foreign country violates fundamental principles of human rights. MCL 722.1105(3).

In cases where both the nation of the child's habitual residence and the nation where the child is located have acceded to the Hague Convention on the Civil Aspects of International Child Abduction, the Convention, as implemented by 42 USC 11601–11611, may preempt the UCCJEA.\* A general discussion of the federal preemption doctrine appears in *People v Hegedus*, 432 Mich 598 (1989). See Sections 13.17–13.19 for more information on the Hague Convention.

\*Rigler, *The Epidemic of Parental Child-Snatching: An Overview*, [http://travel.state.gov/je\\_prevention.html](http://travel.state.gov/je_prevention.html), p 7 (visited January 29, 2004).

## 13.17 Applying the Hague Convention to International Cases

The United States is one of more than 70 nations that have ratified or acceded to the Hague Convention on the Civil Aspects of International Child Abduction (“Convention”). The enabling legislation for the Convention (42 USC 11601-11611) states that its purpose is two-fold: 1) to “establish legal rights and procedures for the prompt return of children who have been wrongfully removed or retained”; and 2) to “secur[e] the exercise of visitation rights.” 42 USC 11601(a)(4). See also Convention, Article 1.\*

To effectuate its purpose, the Convention requires that signatories act promptly to restore the status quo that existed prior to the child’s removal from the country in which he or she habitually resides. The Convention is *not* a vehicle for deciding child access questions. Instead, its main purpose is to ensure that abducted children are returned to the country of habitual residence. It presumes that such disputes are properly resolved in the country where the child habitually resides. *Tyszka v Tyszka*, 200 Mich App 231, 235 (1993); *Friedrich v Friedrich*, 78 F3d 1060, 1063-1064 (CA 6, 1996); *Currier v Currier*, 845 F Supp 916, 920 (D NH, 1994).

The Convention provides an administrative and a judicial avenue for parties seeking relief. These two remedies are not mutually exclusive; the aggrieved party may pursue one or both of them:

- ♦ Administrative assistance in securing a child’s return can be obtained by making an application to the designated Central Authority in the nation where the child habitually resides, or in any other nation that is a party to the Convention. Convention, Article 8. The United States has designated the State Department’s Office of Children’s Issues in the Bureau of Consular Affairs as its Central Authority. 22 CFR 94.2. The address is: U.S. Central Authority, Office of Children’s Issues, SA-29, 2201 C. Street NW, U.S. Department of State, Washington, D.C., 20520. The telephone number is 1-800-407-4747. The website is [www.travel.state.gov/officeofchildissues.html](http://www.travel.state.gov/officeofchildissues.html) (last visited January 29, 2004).
- ♦ A party may also initiate judicial proceedings in the nation where the child is located. Convention, Articles 12, 29. In the United States, federal and state courts have concurrent jurisdiction over Hague Convention cases. 42 USC 11603(a). A U.S. state or federal court must give full faith and credit to the judgment of any other U.S. state or federal court entered in an action brought under the Convention. 42 USC 11603(g). One federal appeals court has held that decisions of the courts of *foreign nations* under the Convention are not entitled to full faith and credit; however, they are entitled to deference under principles of international comity. *Diorinou v Mezitis*, 237 F3d 133, 142-143 (CA 2, 2001).

In addition to the foregoing remedies, the aggrieved party may pursue other available remedies outside the Convention; its provisions are not exclusive. 42 USC 11603(h).

\*For the full text of the Convention, see [www.hcch.net](http://www.hcch.net), or [http://travel/state.gov](http://travel.state.gov) (visited January 29, 2004), or Department of State, *Hague International Child Abduction Convention: Text & Legal Analysis*, 51 Fed Reg 10494 (March 26, 1986) (hereinafter “State Department Analysis”).

A party initiating judicial proceedings under the Convention may request either: 1) the return of wrongfully taken children; or 2) “arrangements for organizing or securing the effective exercise of rights of access to a child.” 42 USC 11603(b); Convention, Article 1. “Rights of access” include “visitation rights” and “the right to take a child for a limited period of time to a place other than the child’s habitual residence.” 42 USC 11602(7); Convention, Article 5b.

The remedy to protect a party’s “rights of access” is less well-defined than the remedy to secure a child’s return. Article 21 of the Convention provides that signatory nations are “bound . . . to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject.” Moreover, the authorities in the signatory nations are to “take steps to remove, as far as possible, all obstacles to the exercise of such rights.” In *Teijeiro Fernandez v Yeager*, 121 F Supp 2d 1118 (WD Mich, 2000), a federal district court held that federal courts do not have jurisdiction to enforce a petitioner’s rights of access under the Convention: “Given the absence of any specific remedy for rights of access [under the Convention], this Court believes that matters relating to access are best left to the state courts, which are more experienced in resolving these issues.” 121 F Supp 2d at 1126.

**Note:** To the extent that it is not preempted by the federal enabling legislation for the Convention, the UCCJEA may provide more specific remedies for parties seeking to enforce their “rights of access” to children in the Michigan courts.

The rest of this discussion will be devoted to the substantive requirements for judicial proceedings to obtain the return of a child under the Convention. Michigan courts may encounter such proceedings where a parent in a foreign nation brings an action under the Convention alleging that a child was wrongfully taken to or retained in Michigan. A foreign parent might also invoke the Convention’s protections in response to a custody action brought in Michigan by the parent who brought the child to this state.

For more information on hearing procedures under the Convention, see Goelman, et al, *Interstate Family Practice Guide: A Primer for Judges* (ABA Center on Children & the Law, 1997), §205. For more information about administrative remedies, see Convention, Article 8; <http://travel.state.gov> (visited January 29, 2004); and State Department Analysis, 51 Fed Reg 10494. Additional cases construing the Convention and its enabling legislation are digested in Rigler, *The Epidemic of Parental Child-Snatching: An Overview*, [http://travel.state.gov/je\\_prevention.html](http://travel.state.gov/je_prevention.html), p 7 (visited January 29, 2004). A booklet for parents on international child abduction and resource materials for judges also appear at this web site.

## A. Nations Where the Convention Applies

Under Article 4, the Convention applies in cases where both the country of the child's habitual residence and the country to which the child was taken have acceded to the Convention. The following chart lists the nations that have either ratified or acceded to the Convention. For a current listing of nations, see [http://travel.state.gov/hague\\_list.html](http://travel.state.gov/hague_list.html) (last visited February 2, 2004).

**Nations Acceding to the Hague Convention on the Civil Aspects of International Child Abduction**

Argentina	France	Poland
Australia	Germany	Portugal
Austria	Greece	Romania
Bahamas	Honduras	Slovak Republic
Belgium	Hungary	Slovenia
Belize	Iceland	South Africa
Bosnia & Herzegovina	Ireland	Spain
Brazil	Israel	St. Kitts and Nevis
Burkina Faso	Italy	Sweden
Canada	Luxembourg	Switzerland
Chile	Former Yugoslav Republic of	Turkey
China	Macedonia	United Kingdom
-Hong Kong Special Reg	Malta	-Bermuda
-Macau	Mauritius	-Cayman Islands
Columbia	Mexico	-Falkland Islands
Croatia	Monaco	-Isle of Man
Czech Republic	Netherlands	-Montserrat
Cyprus	New Zealand	United States
Denmark	Norway	Venezuela
Ecuador	Panama	Federal Republic of Yugoslavia
Finland		Zimbabwe

## B. Children Who Are Subject to the Convention; Effect of Existing Custody Decrees

Relief under the Convention is only available until the child in question reaches age 16, regardless of whether the child was wrongfully taken or retained at an earlier age. Children who fall within the scope of the Convention are subject to its protections regardless of whether a court has issued a custody award concerning them. 42 USC 11603(f)(2).

If there is a custody decree, the Convention applies even if the award was made or is entitled to recognition in the nation to which the child was taken. Convention, Article 17.\* Under Article 17, a court may take into account the reasons underlying an existing custody decree when it applies the Convention. However, a court cannot refuse to return a child solely on the basis of an order awarding custody to the alleged wrongdoer entered in the state to which the

\*State  
Department  
Analysis,  
*supra*.

child was taken. Article 17 is designed to ensure that a person who wrongfully removes or retains a child will not escape the Convention's return provisions by obtaining a custody order in the country of new residence.

### C. The Petitioner's Burden of Proof in Actions to Secure the Return of a Child

Petitioners seeking return of a child under the Hague Convention must establish by a preponderance of the evidence "that the child has been wrongfully removed or retained within the meaning of the Convention." 42 USC 11603(e)(1)(A). Once a petitioner makes this showing, the burden shifts to the respondent to establish that one of several exceptions to return (discussed below) applies. If the respondent fails to establish the existence of an exception, the child must be returned to his or her place of habitual residence. Convention, Article 12. If an exception is established, return is discretionary. *Krishna v Krishna*, 1997 U.S. Dist. LEXIS 4706 (SC ND Cal, 1997). The court in *Krishna*, provided the following regarding the limited discretion of the court:

"The affirmative defenses . . . offer an opportunity, in extraordinary cases, for a court in the country of flight to consider the practical realities of the situation. However, it is the clear import of the [ICARA] that in most cases the duty of that court, when the niceties of the convention are met, is to return the child to the country of habitual residence for resolution of the custody dispute under the laws of that country.' *Friedrich [v Friedrich]*, 983 F2d 1396 at 1403."

#### 1. "Wrongful Removal"

"Wrongfulness" is defined as follows in Article 3 of the Convention:

"The removal or the retention of a child is to be considered wrongful where —

"(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

"(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

"The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

Under Article 5a, “rights of custody” include “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.” Questions about a person’s custody rights are governed by the law of the child’s habitual residence. *Whallon v Lynn*, 230 F3d 450, 455-456 (CA 1, 2000) (Mexican law governed custody rights of unmarried father), and *Friedrich v Friedrich*, 983 F2d 1396, 1402 (CA 6, 1993).

In *Harkness v Harkness*, 227 Mich App 581, 587 (1998), the Michigan Court of Appeals required a mother seeking her children’s return to Germany to establish the following three elements set forth in Article 3 of the Convention:

- ♦ Germany was the children’s “habitual residence” prior to the children relocating to the United States;
- ♦ The mother had either sole or joint rights of custody concerning the children under German law; and
- ♦ At the time the children were retained in the United States, the mother was exercising her custodial rights.

See also *Teijeiro Fernandez v Yeager*, 121 F Supp 2d 1118, 1124 (WD Mich, 2000), finding that no material issue of fact existed with respect to a petitioner’s claim that his children had been wrongfully removed from Spain, where the record demonstrated that he only had a right of access to them.

## 2. “Habitual Residence”

The question of “habitual residence” is among the most-litigated issues under the Convention. The Convention does not define a child’s “habitual residence.” In *Friedrich v Friedrich*, 983 F2d 1396, 1401 (CA 6, 1993), the U.S. Court of Appeals for the Sixth Circuit noted that “habitual residence” is a flexible concept that bears no real distinction from “ordinary residence.” The Sixth Circuit cited the following language from *In re Bates*, No CA 122.89, High Court of Justice, Family Div’n Ct Royal Court of Justice, United Kingdom (1989):

“It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions.” 983 F2d at 1401.

In determining a child’s “habitual residence” for purposes of the Hague Convention, the court in *Friedrich, supra*, 983 F2d at 1401-1402, set forth the following guidelines:

- ♦ A child’s citizenship is not determinative of habitual residence.
- ♦ A person can have only one habitual residence.
- ♦ “On its face, habitual residence pertains to customary residence prior to the removal. The court must look back in time, not forward.”

- ♦ “[H]abitual residence can be altered only by a change in geography and the passage of time, not by changes in parental affection and responsibility. The change in geography must occur before the questionable removal.”

See also *Harkness v Harkness*, *supra*, 227 Mich App at 596 (“Habitual residence should not simply be equated with the last place that the child lived”), and *Feder v Evans-Feder*, 63 F3d 217, 224 (CA 3, 1995) (“A child’s habitual residence is the place where he or she had been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child’s perspective . . . . [The court’s determination] must focus on the child and consists of an analysis of the child’s circumstances in that place and the parents’ present, shared intentions regarding their child’s presence there.”)

If the child’s habitual residence in another country was established because the petitioner fled the United States to avoid criminal penalties, the petitioner may be disentitled to access to U.S. courts. See *Degen v United States*, 517 US 820 (1996), and *Prevot v Prevot*, 59 F3d 556 (CA 6, 1995) (convicted felon who fled to France was disentitled to seek return of his children in the U.S. district court). However, in a case involving a petitioner who left the United States while subject to civil contempt sanctions, the U.S. Court of Appeals for the Sixth Circuit upheld the district court’s refusal to apply the fugitive disentitlement doctrine, finding that “disentitlement will generally be too harsh a sanction in a case involving an ICARA petition [i.e., a petition under the enabling legislation for the Hague Convention].” *March v Levine*, 136 F Supp 2d 831, 856-861 (MD Tenn, 2000), *aff’d* 249 F3d 462, 470 (CA 6, 2001). See also *Walsh v Walsh*, 221 F3d 204 (CA 1, 2000) (court would not apply the disentitlement doctrine to a petitioner who absconded to Ireland prior to trial on criminal charges, finding among other things that its application “would impose too severe a sanction in a case involving parental rights.”)

#### **D. Exceptions to Return of a Child — The Respondent’s Burden of Proof**

If the petitioner in an action to return a child meets his or her burden of proof as described above, the burden shifts to the respondent to show that one of several exceptions to return apply. If the respondent fails to show that an exception exists, the court must “order the return of the child forthwith.” Convention, Article 12. If the respondent establishes an exception to return, however, the mandatory return of the child is made discretionary. *Krishna v Krishna*, 1997 U.S. Dist. LEXIS 4706 (SC ND Cal, 1997).

The Convention provides the following exceptions to the mandatory return of a child:

- ♦ There is “a grave risk that [the child’s] return would expose the child to physical or psychological harm or otherwise place the child in an

intolerable situation.” Convention, Article 13b. The respondent must prove this basis for refusing to return the child by clear and convincing evidence. 42 USC 11603(e)(2)(A). More discussion of this exception appears at Section 13.18(C).

- ♦ The return of the child “would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.” Convention, Article 20. The respondent must prove this basis for refusing to return the child by clear and convincing evidence. 42 USC 11603(e)(2)(A). For a case discussing this exception, see *March v Levine*, *supra*, 136 F Supp 2d at 854-855.
- ♦ If more than one year has elapsed from the date of the alleged wrongful removal or retention, the respondent must prove by a preponderance of the evidence that the child has now presently settled in his or her new environment. Convention, Article 12; 42 USC 11603(e)(2)(B). For a case discussing this exception, see *Blondin v Dubois*, 238 F3d 153, 164 (CA 2, 2001).
- ♦ The petitioner was not exercising his or her custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention. Convention, Article 13a. The respondent must prove this basis for refusing to return the child by a preponderance of the evidence. 42 USC 11603(e)(2)(B). For discussion of this exception, see *Whallon v Lynn*, 230 F3d 450, 459 (CA 1, 2000) and *Ostevoll v Ostevoll*, 2000 U.S. Dist. LEXIS 16178 (SD Ohio, 2000).
- ♦ The child “objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of [his or her] views.” Convention, Article 13b. The respondent must prove this grounds for refusing to return the child by a preponderance of the evidence. 42 USC 11603(e)(2)(B). For discussion of this exception, see *Blondin v Dubois*, *supra*, 238 F3d at 165-168, *Raijmakers-Eghaghe v Haro*, 131 F Supp 2d 953 (ED Mich, 2001) and *Ostevoll v Ostevoll*, *supra*.

Article 13 of the Convention further provides that “[i]n considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child’s habitual residence.”

The foregoing exceptions are to be narrowly construed. 42 USC 11601(a)(4). They “are not a basis for avoiding return of a child merely because an American court believes it can better or more quickly resolve a dispute.” *Friedrich v Friedrich*, 78 F3d 1060, 1067 (CA 6, 1996). See also *Walsh v Walsh*, 221 F3d 204, 217 (CA 1, 2000).

### 13.18 Domestic Violence as a Factor in Judicial Proceedings Under the Hague Convention

This section will consider domestic violence as a factor in the following contexts under the Convention:

- ♦ Was there a wrongful taking or retention of the child?
- ♦ Was a particular nation the place of the child's "habitual residence?"
- ♦ Is there a grave risk that returning the child would expose him or her to physical or psychological harm?

## A. Wrongful Taking or Retention

The Hague Convention makes no mention of domestic violence as a factor in determining whether an alleged taking or retention was wrongful. A parent's motivation for removing a child from his or her habitual residence is not relevant to a determination of wrongfulness — the Convention defines a "wrongful" taking as one that violates the petitioner's rights to custody that were being exercised at the time of removal. Convention, Article 3. In *Friedrich v Friedrich*, 983 F2d 1396 (CA 6, 1993) (hereinafter "*Friedrich I*"), the U.S. Court of Appeals for the Sixth Circuit described the "central core of matters at which the Hague Convention was aimed" as "situations where one parent attempts to settle a difficult family situation, and obtain an advantage in any possible future custody struggle, by returning to the parent's native country . . . ." 983 F2d at 1402. In such cases, the Convention's primary assumption is that the merits of the parties' custody dispute are best decided in the state where the child habitually resides. This assumption governs regardless of whether a party has taken a child to perpetrate or flee from abuse. As the Sixth Circuit panel noted in *Friedrich I*, *supra*:

"[A] United States district court has the authority to determine the merits of an abduction claim, but not the merits of the underlying custody claim. It is important to understand that 'wrongful removal' is a legal term strictly defined in the Convention. It does not require an ad hoc determination or a balancing of the equities. Such action . . . would be contrary to a primary purpose of the Convention: to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court." 983 F2d at 1400.

Although the court may not use evidence of abuse to "balance the equities" between the parties to a Convention case, domestic violence may be relevant to the *existence* of a parent's custody rights in cases arising under the Convention, and thus to the question of whether a taking was wrongful. The question whether a parent has custody rights is to be resolved using the choice of law rules of the state of habitual residence. See *Whallon v Lynn*, 230 F3d 450, 455-456 (CA 1, 2000), and *Feder v Evans-Feder*, 63 F3d 217, 225 (CA 3, 1995). If the applicable law imposes limits on a parent's custody rights as a result of domestic violence, U.S. courts are bound to apply such laws. Convention, Article 3a. See also *Friedrich v Friedrich*, 78 F3d 1060, 1066, n 6 (CA 6, 1996) (hereinafter "*Friedrich II*") (noting that a U.S. court would be bound to apply a foreign law that expressly defines acts constituting the "exercise" of custody for purposes of the Convention). Thus, a U.S. court might be justified in finding that removal of a child is not wrongful under the

Convention where the petitioner had assaulted the respondent in violation of a court order or law in the state of habitual residence that conditions access to children on the petitioner's cessation of violence. Such findings must be based on explicit provisions of the law of the habitual residence state, however. In determining whether domestic violence affects the existence of parental rights, a U.S. court must remember that its role is not to make traditional custody decisions, but to determine the proper jurisdiction for making them. Examination of the best interests of a child under traditional U.S. state laws violates the aim and spirit of the convention. *Ciotola v Fiocca*, 684 NE2d 763, 769-770 (1997).

## B. "Habitual Residence" of the Child

In determining a child's "habitual residence," United States courts have considered whether a parent has been forced to reside with the child in a location against his or her will. In *In re Ponath*, 829 F Supp 363, 366 (CD Utah, 1993), a German citizen forced his wife (a U.S. citizen) to remain in Germany with their U.S.-born child "by means of verbal, emotional and physical abuse." As a result of the husband's behavior, the wife and child remained in Germany for ten months against the wife's will. The husband eventually permitted the wife and child to return to the U.S. but later filed a request for return of the child under the Convention. The U.S. District Court denied the husband's petition, finding that the child's habitual residence was in the U.S. The court reasoned:

"Although it is the habitual residence of the child that must be determined, the desires and actions of the parents cannot be ignored by the court in making that determination when the child was at the time of removal or retention an infant. The concept of habitual residence must . . . entail some element of voluntariness and purposeful design . . . . In this case, what began as a voluntary visit to petitioner's family in Germany, albeit an extended visit, might be viewed by the court as a change of habitual residence of the minor child but for respondent's intent and desire to return to the United States with the minor child and petitioner's willful obstruction of that purpose . . . . The aim of the Hague Convention is to prevent one parent from obtaining an advantage over the other in any future custody dispute . . . . For the court to grant petitioner's motion, and thereby sanction his behavior in forcing continued residence in Germany upon respondent, and through her, the minor child, would be to thwart a principle purpose of the Hague Convention. In the court's view, coerced residence is not habitual residence within the meaning of the Hague Convention." 829 F Supp at 367-368.

In cases involving coerced residence, the Eighth Circuit's decision in *Nunez-Escudero v Tice-Menley*, 58 F3d 374 (CA 8, 1995) should also be consulted. In that case, a U.S. citizen fled from Mexico with her Mexican-born infant to escape physical, sexual, and verbal abuse at the hands of her Mexican

husband. Overruling the district court's denial of the husband's petition for return of the child, the Eighth Circuit panel remanded the case for a determination of the child's habitual residence, finding that the record before it was insufficient in this regard. In response to the wife's assertion that the child was not habitually resident in Mexico because she had been forced to remain there against her will, the panel distinguished *In re Ponath, supra*, as follows:

"In *Ponath* . . . the child was born and lived in the United States before visiting Germany where his father forced the family to remain . . . . In contrast, here, the baby was born and lived only in Mexico until his mother fled to the United States. To say that the child's habitual residence derived from his mother would be inconsistent with the Convention, for it would reward an abducting parent and create an impermissible presumption that the child's habitual residence is wherever the mother happens to be." 58 F3d at 379.

### C. "Grave Risk" of Exposing the Child to Harm

In Convention cases where domestic violence is at issue, an important question is the applicability of the Article 13b exception for situations where there is "a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." U.S. courts have not taken a consistent approach in weighing domestic abuse as a factor under Article 13b.

The U.S. Court of Appeals for the Sixth Circuit has articulated in dicta a narrow, two-pronged standard for evaluating when a child faces a grave risk of harm for purposes of the Convention:

"[A] grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute — e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection." *Friedrich II, supra*, 78 F3d at 1069. See also *Freier v Freier*, 969 F Supp 436, 442 (ED Mich, 1996).

The Sixth Circuit revisited this standard in *March v Levine*, 249 F2d 462 (CA 6, 2001). Here a state court had entered a default judgment as a sanction for a discovery violation in a wrongful death action against the father of two children. The children's maternal grandparents brought the wrongful death action, alleging that the father had caused the death of the children's mother, who disappeared and was never found. No criminal charges were filed against

the father. The father moved to Mexico with the children prior to the filing of the wrongful death action. The maternal grandparents abducted the children during visitation and the father sought their return under the Convention. The U.S. district court in Tennessee found that the grandparents had failed to establish by clear and convincing evidence that return would subject the children to a “grave risk of harm.” 136 F Supp 2d 831, 854 (MD Tenn, 2000). The U.S. Court of Appeals agreed:

“Even assuming that the default judgment would be upheld on appeal, that it should be given preclusive effect in the proceedings, and that it is sufficient to show that there is some risk of harm to the children in being returned to March, this default judgment is not clear and convincing evidence that there is a *grave* risk of harm to the children in being returned to their father.” 249 F3d at 472. [Emphasis in original.]

The Court of Appeals also found no evidence that the father had abused or neglected the children, and the Mexican authorities had not been shown to be unwilling or incapable of protecting the children. *Id.*

The U.S. Court of Appeals for the Eighth Circuit has also taken a narrow view of the relevance of domestic violence to the question whether return poses a “grave risk of harm” to the child. This Court regards domestic violence as a matter for consideration in the underlying custody dispute, which must be resolved in the country of the child’s habitual residence. In *Nunez-Escudero v Tice-Menley*, 58 F3d 374 (CA 8, 1995), the respondent, the mother of an infant child born in Mexico, fled to the U.S. from her husband’s home in Mexico. In response to the husband’s petition for return of the child under the Convention, the respondent invoked the Article 13b “grave risk of harm” exception by way of affidavits stating that her husband and his family had physically, sexually, and verbally abused her, and treated her as a prisoner in her home. Without deciding whether Mexico was the child’s habitual residence, the district court refused to order the child’s return to Mexico, finding that there was a grave risk that return would expose him to physical and psychological harm and place him in an intolerable situation. In reaching its conclusion, the district court based its decision on the child’s young age, his dependency on his mother, and the possibility that he would be institutionalized in Mexico as a result of the custody action between his parents; the district court did not base its decision on the respondent’s allegations of domestic violence.

On appeal, the Eighth Circuit panel reversed and remanded the case for further proceedings, finding that it could not rule on the district court’s decision regarding the Article 13b exception without a prior finding as to the child’s habitual residence. However, the panel stated that only “specific evidence” of “severe potential harm to the child” will trigger the Article 13b exception. 58 F3d at 376-377. Applying this standard, the panel noted that the district court incorrectly factored the possible separation of the child from his mother in assessing whether his return to Mexico would constitute a grave risk

of harm under the Article 13b exception. The panel further found that most of the evidence of domestic abuse was “general and concern[ing] the problems between [the wife], her husband and father-in-law,” and thus “irrelevant to the Article 13b inquiry.” 58 F3d at 377. It explained as follows:

“The Article 13b inquiry does not include an adjudication of the underlying custody dispute . . . . It is not relevant to this Convention exception who is the better parent in the long run, or whether [the wife] had good reason to leave her home in Mexico and terminate her marriage to [the husband] or whether [the wife] will suffer if the child she abducted is returned to Mexico.” 58 F3d at 377.

\*See Section 13.19 for a discussion of “undertakings.”

In contrast, the U.S. Court of Appeals for the First Circuit has concluded that domestic violence may pose a “grave risk of harm” to children under Article 13b. In *Walsh v Walsh*, 221 F3d 204 (CA 1, 2000), the petitioner-father, while living in the U.S., severely physically abused the respondent-mother over a long period, at times in front of the children. The petitioner also assaulted others and fled the U.S. to Ireland after being charged with threatening to kill a neighbor. After the respondent and children joined the petitioner in Ireland, the domestic violence continued, despite the entry of a protective order by an Irish court. Respondent-mother returned to the U.S. with the children, one of whom was diagnosed with post-traumatic stress disorder. The U.S. district court granted the father’s petition, concluding that the respondent had failed to meet her burden of proof under Article 13b. The district court also required several “undertakings,”\* including a “no-contact” order if respondent returned to Ireland with the children. The district court concluded that the evidence did not reveal an immediate and serious threat to the children’s physical safety that could not be dealt with by Irish authorities. Regarding psychological harm, the district court found that the disorders suffered by one of the children might be mitigated by the lack of exposure to the physical abuse of the respondent-mother. The U.S. Court of Appeals reversed, finding that the district court erred in requiring evidence of immediate harm. *Id.* at 218. Furthermore, the Court of Appeals found that because the petitioner had disobeyed court orders in the U.S. and Ireland, the risk of harm to the children would not be mitigated by the undertakings ordered by the district court. *Id.* at 220-221. The Court summarized the district court’s errors as follows:

“In our view, the district court committed several fundamental errors: it inappropriately discounted the grave risk of physical and psychological harm to children in cases of spousal abuse; it failed to credit John’s more generalized pattern of violence, including violence directed at his own children; and it gave insufficient weight to John’s chronic disobedience of court orders. The quantum here of risk of harm, both physical and psychological, is high. There is ample evidence that John has been and can be extremely violent and that he cannot control his temper. There is a clear and long history of spousal abuse, and of fights with and threats against persons other than his wife. These include John’s

threat to kill his neighbor . . . and his fight with his son Michael.”  
*Id.* at 219-220.

A subsequent decision by the First Circuit Court of Appeals relied on *Walsh*, but found that allegations of verbal abuse and a single incident of shoving established an insufficient risk of harm to meet the requirements of Article 13b. In *Whallon v Lynn*, 230 F3d 450, 460 (CA 1, 2000), there were no allegations that the petitioner-father abused the daughter who was the subject of the petition. Although the respondent-mother and daughter were held at gunpoint by unknown persons as they attempted to leave Mexico, the Court upheld the district court’s finding that the father’s denial of responsibility for the incident was credible.

The Second Circuit Court of Appeals has interpreted the “grave risk of harm” exception broadly in a case involving domestic violence. In *Blondin v Dubois*, 238 F3d 153, 163 (CA 2, 2001), the Court held that “a ‘grave risk of psychological harm,’ even construed narrowly, undoubtedly encompasses an ‘almost certain[]’ recurrence of traumatic stress disorder.” In *Blondin*, the respondent-mother presented uncontested expert testimony that the children would face a recurrence of traumatic stress disorder if returned to France, the site of physical and psychological abuse of them and their mother. *Id.* at 159. The Court also concluded that the district court properly considered whether the children were settled in their new environment, and the objection to returning to France by one of the children, aged eight, in deciding whether Article 13b applied. *Id.* at 164, 166-167. The Court noted, however, that these factors are not conclusive of the issue of “grave risk of harm.” *Id.*

A federal district court in California has liberally construed the “grave risk of harm” exception to include domestic violence as a factor in the court’s decision whether to return a child. In *Krishna v Krishna*, 1997 U.S. Dist. LEXIS 4706 (SC ND Cal, 1997), the petitioner sought return of his child after his wife took the child from Australia to the U.S. Although the petitioner met his threshold burden under the Convention, the district court denied his petition based on the Article 13b exception for situations posing a grave threat of harm to the child. The court found that the respondent had left Australia with her child after allegedly suffering regular and serious beatings at the hands of the petitioner. The respondent had come to the U.S. not to “forum shop,” but to find family and financial support. Based on these findings, the court held:

“In light of the prior history of alleged abuse and discord that has existed between the parties, the court finds that the return of the child to Australia would pose a grave risk to the child’s well being. Although there is little evidence that relocation of the child to Australia poses a grave threat of physical harm to the child, the court finds that there is compelling evidence establishing the potential for serious psychological harm . . . . Return of the child to Australia would only serve to reinstate the child in a highly stressful and psychologically damaging environment, particularly

because [respondent] has relatively limited familial support in Australia. Moreover, the child is currently well settled in the United States where a divorce proceeding has been filed and can be expedited to minimize the costs to [petitioner].”

### 13.19 Entering Orders That Minimize the Risk to the Child in Hague Convention Cases

Once proceedings have been initiated under the Convention, Article 7b provides for appropriate “provisional measures,” which shall be taken “to prevent further harm to the child or prejudice to interested parties.” 42 USC 11604(a) empowers courts deciding cases under the Convention to “take or cause to be taken measures under Federal or State law . . . to protect the well-being of the child involved or to prevent the child’s further removal or concealment before the final disposition of the petition.” A court’s authority to take such measures is limited by a requirement that the “applicable requirements of State law” be satisfied before a child is removed from the person having physical custody. 42 USC 11604(b).

The State Department’s legal analysis of the Convention makes the following comment regarding Article 7b:

“To prevent further harm to the child, the [Central Authority] would normally call upon the state welfare agency to take whatever protective measures are appropriate and available consistent with that state’s child abuse and neglect laws. The [Central Authority], either directly or with the help of state authorities, may seek a written agreement from the abductor (and possibly from the applicant as well) not to remove the child from the jurisdiction pending procedures aimed at return of the child. Bonds or other forms of security may be required.”

If a court decides that a child must be returned to its country of habitual residence under the Convention, it need not limit its involvement in the case to a bare statement that return is ordered. In *Feder v Evans-Feder*, 63 F3d 217, 226 (CA 3, 1995), the U.S. Court of Appeals for the Third Circuit noted that in appropriate circumstances, courts may ameliorate any short-term harm to the child by making return contingent upon “undertakings” from the petitioning parent. See also *Walsh v Walsh*, 221 F3d 204, 217-218 (CA 1, 2000). Such “undertakings” may include:

- ♦ A requirement that the petitioner pay for the respondent and child to travel to the country where the child habitually resides.
- ♦ A requirement that the petitioner make appropriate housing arrangements for the respondent and child in the country where the child habitually resides.
- ♦ A requirement that the petitioner pay living expenses for the respondent and child in the country of the child’s habitual residence.

- ♦ Orders that the petitioner have no contact with the respondent if the respondent returns to the country of the child's habitual residence.
- ♦ Orders that the petitioner will have no contact or limited (e.g., supervised) contact with the children once they return to the country of the child's habitual residence.

If implementation of such undertakings is necessary to avoid grave risk to the child, the petitioned court may need to investigate whether they would be enforceable in the country of the child's habitual residence. See *Walsh v Walsh*, *supra*, 221 F3d at 219.

The court must take care when crafting undertakings to ensure that the order is enforceable and does not exceed the court's authority by imposing upon foreign courts. In *Danaipour v McLarey*, 286 F3d 1 (CA 1, 2002), the parties sought a child-custody agreement in Sweden. The Swedish court granted the parties joint custody of the children. McLarey fled to the United States with the children and claimed that Danaipour was sexually abusing at least one of the children. Danaipour filed a petition in Massachusetts seeking the return of the children under the Hague Convention. McLarey claimed that returning the children to Sweden exposed them to a "grave risk" of physical or psychological harm or would otherwise place the children in an intolerable situation.\* The Massachusetts court did not make findings regarding the sexual abuse or a "grave risk." Instead the court determined that a sexual abuse evaluation was necessary to determine if a "grave risk" precluded the return of the children. The court concluded that the evaluation could be made in Sweden without putting the children at risk. The court ordered that the children be returned to Sweden. The order included, among other things, the following "undertakings":

- that a forensic evaluation be conducted in Sweden;
- that a Swedish court decide the implications of the forensic evaluation for the custody of the children;
- that Danaipour have no contact with the younger daughter unless ordered by the Swedish court;
- that Danaipour have only telephone contact three times a week with the older daughter unless the Swedish court ordered otherwise;
- that Danaipour request that a Swedish court enter the terms of the order as a "mirror order" enforceable in Sweden. *Id.* at 22.

The trial court's order was appealed to the United States Court of Appeals. The U.S. Court of Appeals held that the trial court's order went beyond its authority by imposing requirements on a foreign court. In addition, the trial court incorrectly assumed that the order would be enforced by a foreign court. *Id.* at 16. The U.S. Court of Appeals concluded:

\*See Section 13.18(C) for more information regarding a "grave risk" of exposing a child to harm under the Hague convention.

“In sum, the district court offended notions of international comity under the Convention by issuing orders with the expectation that the Swedish courts would simply copy and enforce them. The district court had no authority to order a forensic evaluation done in Sweden, or to order the Swedish courts to adjudicate the implications of the evaluation for the custody dispute. . . . Moreover, its assumption that Swedish courts would enforce the undertakings was both legally and factually erroneous.

. . .

There is also authority indicating that undertakings should be used more sparingly when there is evidence that the abducting parent is attempting to protect the child from abuse. . . . [U]ndertakings are most effective when the goal is to preserve the status quo of the parties prior to the wrongful removal. This, of course, is not the goal in cases where there is evidence that the status quo was abusive.” *Id.* at 25.

In *Blondin v Dubois*, 238 F3d 153, 158-161 (CA 2, 2001), the U.S. Court of Appeals for the Second Circuit upheld a district court’s findings that no “undertakings” by the parties could sufficiently mitigate the psychological harm that the children would suffer upon being returned to the country where they and their mother were abused.

In cases where return of a child is mandated despite serious safety concerns, one scholar has suggested that courts consider sending the child to a “safe harbor” until the custody dispute can be resolved in the country of habitual residence. This “safe harbor” might be the location of the parent who took the child from its habitual residence. In cases involving allegations of domestic violence, a “safe harbor” provision might protect a child and fleeing parent in the refuge state while the courts of the habitual residence state take evidence regarding the effect that the alleged abuse should have on rights of access to the child. Comment, *Domestic Violence: Is It Being Sanctioned By the Hague Convention?* 4 Southwest Journal of Law and Trade in the Americas 71, 83 (1997), citing Hilton, *Dreaming the Impossible Dream: Responding to a Petition Under the Convention on the Civil Aspects of International Child Abduction*, in North American Symposium on International Child Abduction, 6, 13 (September 30, 1993).